

FILED  
SEP 29 1923  
WM. R. STANSBURY

**No. 546**

# Supreme Court of the United States.

OCTOBER TERM, 1923.

WILLIAM R. RODMAN, United States Marshal,  
*Petitioner,*

*vs.*

ROLAND R. POTHIER,  
*Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
FIRST CIRCUIT.

DAVIS G. ARNOLD,  
*Counsel for Respondent.*

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

RECEIVED

APR 10 1951

FROM

DR. J. R. OPPENHEIMER

CHICAGO, ILL.

TO

## INDEX.

---

Statement .....	PAGE 1
-----------------	-----------

### POINT I.

<p>The respondent was indicted under Section 272 of the Federal Penal Code, for shooting Major Cronkhite on October 25, 1918, "within and on lands theretofore acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, within and on the Camp Lewis Military Reservation," and he was sought to be removed for trial under the indictment, from Rhode Island to the State of Washington pursuant to Section 1014 of the United States Revised Statutes. In that proceeding it became the duty of the Court before which he was brought, to determine whether there was probable cause that an offense against the United States had been committed, and whether the Court to which the accused was sought to be removed had jurisdiction of the same .....</p>	1
--	---

### POINT II.

<p>The record shows that, at the time when Major Cronkhite met his death, title to the Camp Lewis Reservation had not been acquired by the United States, and the jurisdiction of the State of Washington, as a sovereign state over the lands, had not passed out of it and into the Government of the United States. There was, therefore, a total absence of probable cause as to an essential element of the crime pleaded.....</p>	5
---	---

## TABLE OF CASES CITED.

	PAGE
<i>Abendroth vs. Town of Greenwich</i> , 20 Conn. 356	9
<i>Beavers vs. Henkel</i> , 194 U. S. 73.....	3
<i>Chavez vs. Bergere</i> , 231 U. S. 482.....	16
<i>Chicago, R. I. &amp; P. Ry. Co. vs. McGlin</i> , 114 U. S. 542.....	12
<i>Concessions Co. vs. Morris</i> , 109 Wash. 65.....	13
<i>Desert Salt Co. vs. Tarpey</i> , 142 U. S. 241.....	16
<i>Fairfax Adm. vs. Lewis</i> , 11 Leigh, 233.....	9
<i>Federal Criminal Code</i> , Sec. 272.....	2
<i>Fort Leavenworth Ry. Co. vs. Lowe</i> , 114 U. S. 538	11
<i>Green vs. Henkel</i> , 183 U. S. 261.....	4
<i>Hastings vs. Murehie</i> , 219 Fed. Rep. 83, 88.....	2
<i>Henry vs. Henkel</i> , 235 U. S. 228.....	2
<i>Holt vs. United States</i> , 218 U. S. 245.....	17
<i>In re O'Connor</i> , 37 Wis. 379.....	12, 15
<i>Jackson ex dem Hopkins vs. Leake</i> , 12 Wendell 105	9
<i>Jones vs. Davis</i> , 22 Wis. 421, 424.....	9
<i>Kochler vs. Hughes</i> , 148 N. Y. 507.....	9
<i>Langmede vs. Weaver</i> , 65 Ohio State 17.....	9
<i>Laws of Washington</i> , Chap. 3, Laws 1917.....	7
<i>Louie vs. U. S.</i> 254 U. S. 548.....	4
<i>McDonald vs. Campbell</i> , 2 Serg. & R. 473, 474....	9
<i>Mitchell vs. Bartlett</i> , 51 N. Y. 447.....	9
<i>Opinions of Attorney General</i> , Vol. 7, P. 573....	15
<i>Opinions of Attorney General</i> , Vol. 8, P. 388....	15
<i>Opinions of Judge Advocate General</i> , 015, 7, Feb. 6/18.....	15
<i>People vs. Godfrey</i> , 17 John 225.....	12, 15
<i>People vs. Humphrey</i> , 23 Mich. 471.....	12
<i>Pothier vs. Rodman</i> , 43 Sup. Ct. Rep. 374.....	2
<i>Price vs. Henkel</i> , 216 U. S. 491.....	2, 3
<i>Schulenberg vs. Harriman</i> , 21 Wall, 44.....	16
<i>Tinsley vs. Treat</i> , 205 U. S. 20.....	2, 3
<i>United States vs. Bateman</i> , 34 Fed. Rep. 86....	12
<i>United States vs. Bevans</i> , 3 Wheat, 388.....	15
<i>United States vs. Black</i> , 160 Fed. Rep. 431.....	2
<i>United States vs. Lewis</i> , Fed. Rep. 469, 472....	12
<i>United States vs. Penn.</i> , 48 Fed. Rep. 669.....	12
<i>Van vs. Edwards</i> , 135 N. C. 661.....	9

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

WILLIAM R. RODMAN, United States  
Marshal,

Petitioner,

*against*

ROLAND R. POTHIER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

I.

The respondent was indicted under Section 272 of the Federal Penal Code, for shooting Major Cronkhite on October 25, 1918, "within and on lands theretofore acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, within and on the Camp Lewis Military Reservation," and he was sought to be removed for trial under the indictment, from Rhode Island to the State of Washington pursuant to Section 1014 of the United States Revised Statutes. In that proceeding it became the duty of the Court before which he was brought, to determine whether there was probable cause that an offense against the United States had been committed, and whether the Court to which the accused was sought to be removed had jurisdiction of the same.

The Circuit Court of Appeals has determined these questions in the negative. This case originally came be-

that the place of its commission was "territory within the exclusive jurisdiction of the United States," yet the District Court where the indictment is pending has full jurisdiction to try and determine this fact, as well as other allegations of the indictment. The denial of this allegation as to the place of commission does not raise a question properly of the jurisdiction of the trial court, but goes to the merits, raising the question whether the act charged was a violation of Federal Law. *Louie v. United States*, 254 U. S. 548. In view of this late decision of the Supreme Court it is unnecessary to cite the earlier cases in which this distinction was pointed out.

The respondent having been charged with crime by an indictment, whose sufficiency on its face is not questioned, and the *locus* of the crime having been alleged as within the territorial limits of the court which found the indictment, as those limits are defined by law, the District Court of Rhode Island was right in ordering his removal for trial under Section 1014, Revised Statutes.

If upon the trial it appeared that the place where the alleged crime was committed was not a place to which the penal laws of the United States applied, then the respondent was not guilty and would, of course, be acquitted.

The Circuit Court of Appeals has thus erroneously attempted in a *habeas corpus* proceeding to try the question of the guilt or innocence of the accused.

## CONCLUSION.

The question is one of importance to the United States.

If the decision of the Circuit Court of Appeals is allowed to stand unreversed, it will constitute a dangerous precedent in all cases where the United States Government, with the consent of a State, acquires, occupies, and exclusively controls territory within the State for the purpose of carrying on military operations. *Defect of title may become a new defense for murder.*

The decision of this question is of special importance in the particular case here involved because of the fact that the authorities of the State of Washington have consistently abstained from exercising jurisdiction to apprehend and punish anyone implicated in the alleged crime. The case of *Concessions Company v. Morris*, decided by the Supreme Court of Washington, 186 Pac. Rep. 655, shows that the county authorities of Pierce County, by demurring to the petition in that case, admitted as a fact that during the year 1918 the United States had exclusive jurisdiction over Camp Lewis.

Moreover, if proceedings should be instituted by State authorities to punish the parties implicated in this homicide, the courts of that State might not feel bound by the decision of the Circuit Court of Appeals but would follow any decision rendered by this court.

Without expressing an opinion on the question whether or not the crime of murder was actually committed, a question which of course can only be determined by a jury, it is of great importance to those charged with the administration of the criminal law and of great public importance that men indicted for murder should not escape trial altogether because neither the State court nor the Federal court will exercise jurisdiction. This is the only court which can decide finally the important question here involved, which from the nation-wide discussion and comment which the crime has excited must be regarded as one of great public interest.

JAMES M. BECK,

*Solicitor General.*

SEPTEMBER, 1923.





## POINT III.

There is no merit in the contention that the United States, with the consent of the legislature of Washington, exercised exclusive de facto jurisdiction over the territory embracing the locus of the crime.....	14
---	----

## POINT IV.

This is not a case where men indicted for murder are to escape trial altogether because neither the State Court nor the Federal Court will exercise jurisdiction, as contended by the Government .....	19
--	----

## POINT V.

It is respectfully submitted that this is not a case for the granting of a Writ of Certiorari within established precedents, and that it should be denied . . . . .	19
---	----

## APPENDIX.

## I.

	PAGE
Telegram of Attorney-General to the U. S. Attorney at Seattle.....	26

## II.

Extract from Report of Honorable J. W. Selden, Prosecutor-Attorney, Pierce County, Washington.....	27
--	----

## III.

Letter of Hiram M. Smith to J. W. Selden.....	21
---	----

## IV.

Letter of Hiram M. Smith to H. Watkins Ellerson	22
---	----

## V.

Decisions of Commissioner Hitchcock in the case of U. S. against Rosenbluth.....	28
--	----

## VI.

Final Decision and Order of Commissioner Hitchcock.....	33
---	----

## VII.

Opinion rendered by U. S. Circuit Court of Appeals for the First Circuit, Pothier <i>vs.</i> Rodman	35
---	----

fore this Court on an appeal by Pothier from a decision of the United States District Court for Rhode Island directing his removal. By a decision rendered on March 12, 1923, *Pothier v. Rodman*, 261 U. S.—(43 Supr. Ct. Rep. 374), the record was transferred by this Court to the Circuit Court of Appeals for the First Circuit, on the ground that the question raised was not one directly appealable to this Court from the District Court, the objection raised being of a character which went to the merits, and not to the jurisdiction of the District Court of Rhode Island.

The Circuit Court of Appeals, in a careful opinion, which is appended hereto, proceeded to consider the question as to whether this was a proper case for removal under the statute, and the extent to which it could, in such proceeding, determine whether probable cause had been established showing that an offense against the United States had been committed.

That the Court possessed such power was determined in *Tinsley v. Treat*, 205 U. S. 20, *Price v. Henkel*, 216 U. S. 491, *Henry v. Henkel*, 235 U. S. 228, *United States v. Black*, 160 Fed. Rep. 431, and *Hastings v. Murchie*, 219 Fed. Rep. 83, 88, as well as in other cases cited in the opinion below.

Section 272 of the Federal Penal Code, which is the statute under which the indictment was found, refers to crimes and offenses punishable under the laws of the United States. The material provision reads

“Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”

It is therefore an essential element of the offense, as is indicated also by the terms of the indictment, that the crime must have been committed on lands acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be. Consequently if, in the removal proceedings, the proof negated the existence of the essential element just mentioned, there was no probable cause for finding that a crime had been committed, and it was the duty of the Court to deny the application for removal.

The petition for the writ of certiorari totally ignores the character of these proceedings, and apparently proceeds on the theory that, because this question might be tried in the District Court for the Western District of Washington, the Federal Courts within the jurisdiction where the respondent was arrested cannot exercise the power conferred upon them by Section 1014 of the United States Revised Statutes.

The finding of an indictment is by no means conclusive (*Price v. Henkel*, 216 U. S. 491; *Tinsley v. Treat*, 205 U. S. 20). The duty of adjudication on the question of probable cause and of jurisdiction nevertheless rested upon the courts before which the respondent was brought. As was said by Mr. Justice Brewer in *Beavers v. Henkel*, 194 U. S. 73, 83, in language approved in *Tinsley v. Treat* and other cases, *supra*:

“It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that

ceded to the United States exclusive jurisdiction thereof. (R. pp. 135, 146.)

The statute of the State of Washington is set forth in full beginning upon page 135 of the Record. One of the purposes of the act, as set forth in its title, is "Granting the consent of the State to such conveyance and ceding exclusive legislative jurisdiction to the United States over the lands so conveyed."

Section 20 of the act reads as follows:

Pursuant to the Constitution and laws of the United States, and especially to paragraph seventeen of section 8 of Article I of such Constitution, the consent of the Legislature of the State of Washington, is hereby given to the United States to acquire, by donation from Pierce County, title to all lands herein intended to be referred to, to be evidenced by the deed or deeds of Pierce County signed by the chairman of its board of county commissioners and attested by the clerk of such board under the seal of such board, *and the consent of the State of Washington is hereby given to the exercise by the Congress of the United States of exclusive legislation in all cases whatsoever over such tracts or parcels of land so conveyed to it: Provided, Upon such conveyance being concluded a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land to be filed in the auditor's office of Pierce county, together with copies of the orders, deeds, patents, or other evidences in writing of the title of the United States: And provided, That all civil process*

issued from the courts of this State and such criminal process as may issue under the authority of this State, against any person charged with crime in cases arising outside of said reservation, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

Paragraph 17 of Section 8, Article I of the Constitution of the United States gives Congress power—

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places *purchased* by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful buildings.

The crime charged was murder, and by Paragraph 3 of Section 272 of the Penal Code murder is a crime against the United States—

When committed within or on any lands reserved or *acquired* for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The place where the alleged crime was committed was included within the territorial limits over which the court which found the indictment had jurisdiction. See Judicial Code, Section 112, by which Pierce County is included in the territory which constitutes the Southern Division of the Western District of Washington.

At the time of the alleged crime (October 25, 1918) the land embracing the *locus* thereof had been turned over by Pierce County to the United States and the United States had established thereon a military cantonment and was exercising over the same exclusive control and jurisdiction (R. pp. 24, 27, 31) pursuant to consent given by the Legislature of the State of Washington.

Where lands are, with the consent of the State, "acquired" by the United States for one of the purposes specified in the constitutional provision, the jurisdiction of the United States becomes exclusive. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525.

The agreement of December 2, 1916, provided for the designation of the lands by the Secretary of War, and they were at the time designated by the Secretary of War (R. pp. 24-25), and thereafter, on January 27, 1917, the Legislature of the State of Washington by the Act already cited expressly authorized and requested Pierce County to purchase or condemn the same for *donation to the United States*. Designated tracts aggregating 36,930 acres, were duly condemned by Pierce County in pursuance

of the authority and direction of the Legislature of the State, and before July 1, 1918, such lands, which embraced the *locus* of the alleged crime, were *actually donated to and actually accepted by* the United States (R. p. 30), and at the time of the murder the United States was using the same for military training and maneuvers, with the assent of the Legislature of the State, and the United States was in fact exercising exclusive jurisdiction and control over the same. (R. p. 30 *et seq.*, p. 39.) At the time last mentioned, as respects the lands described, the agreement of December 2, 1916, had been performed and completed by both parties to the transaction and nothing remained to be done except the delivery by Pierce County to the United States of the deed evidencing title to the property. Although at that time the transaction as respects this 36,930 acres had been completed on both sides, and the deed offered, the execution and delivery of the deed had been postponed at the suggestion of the War Department until the remainder of the lands embraced in the agreement of December 2, 1916, had been purchased or condemned by Pierce County, so that all the land could be included in one deed. (R. p. 31.) The deed to the above-mentioned tract, as well as the remainder of the tract embraced in Camp Lewis, was executed on October 1, 1919, and recorded on November 15, 1919. (R. p. 148.)



**At the time of the murder the United States was exercising, with the consent of the legislature of the State, exclusive de facto jurisdiction over the territory embracing the locus of the crime.**

The murder took place at Camp Lewis. Cronkhite was shot while performing his duties as an Army officer at such camp. Pothier and Rosenbluth, who are indicted for the murder, were subordinates of the murdered man, and the alleged murder took place while all three were engaged in Army maneuvers.

Camp Lewis was practically completed on September 1, 1917. Barracks, streets, waterworks, sewers, etc., had been constructed, and on the date last mentioned the 91st Division of the Army was then in camp and in course of training. Guards were established about the area and military rules and regulations were established and enforced, and the administration and control of the territory *de facto*, if not *de jure*, was exclusively and completely in the United States. (R. p. 39 *et seq.*) This exclusive administration and control was fully assented to by the State authorities, and no State officer exercised, or undertook to exercise, any authority, control, or jurisdiction whatsoever within the area embraced in Camp Lewis.

Such was the situation when Cronkhite was killed on October 25, 1918.

In the case of *Holt v. United States*, 218 U. S. 245, a murder case, the point was made by plaintiff in error that the record failed to show exclusive Federal jurisdiction over the place where the crime was laid.

This court, Mr. Justice Holmes writing, said at page 252:

The documents referred to are not before us, but they properly were introduced, and, so far as we can see, justified the finding of the jury, even if the evidence of the *de facto* exercise of exclusive jurisdiction was not enough *or if the United States was called on to try title in a murder case*. We think it unnecessary to discuss this objection in greater detail.

**The District Court was right in refusing to discharge the respondent in a habeas corpus proceeding merely because a controverted question of fact had been raised.**

Whether the authority of the United States had or had not attached to the specified place of the alleged murder was a question of fact to be decided by the District Court for the Western District of Washington, and even if that authority had not attached, that court had jurisdiction to determine the question. The question was not one of the jurisdiction of that court but one which went to the merits of the case. In other words, the decision of that question would be one of the elements tending to show that the respondent had or had not violated the laws of the United States. Such questions are for the determination of the trial court. *Henry v. Henkel*, 235 U. S. 219. Such was the reasoning of the district judge who, in his opinion (Record, p. 50), said:

While it is true that in order to establish the crime against the United States it must appear

that the place of its commission was "territory within the exclusive jurisdiction of the United States," yet the District Court where the indictment is pending has full jurisdiction to try and determine this fact, as well as other allegations of the indictment. The denial of this allegation as to the place of commission does not raise a question properly of the jurisdiction of the trial court, but goes to the merits, raising the question whether the act charged was a violation of Federal Law. *Louie v. United States*, 254 U. S. 548. In view of this late decision of the Supreme Court it is unnecessary to cite the earlier cases in which this distinction was pointed out.

The respondent having been charged with crime by an indictment, whose sufficiency on its face is not questioned, and the *locus* of the crime having been alleged as within the territorial limits of the court which found the indictment, as those limits are defined by law, the District Court of Rhode Island was right in ordering his removal for trial under Section 1014, Revised Statutes.

If upon the trial it appeared that the place where the alleged crime was committed was not a place to which the penal laws of the United States applied, then the respondent was not guilty and would, of course, be acquitted.

The Circuit Court of Appeals has thus erroneously attempted in a *habeas corpus* proceeding to try the question of the guilt or innocence of the accused.

## CONCLUSION.

The question is one of importance to the United States.

If the decision of the Circuit Court of Appeals is allowed to stand unreversed, it will constitute a dangerous precedent in all cases where the United States Government, with the consent of a State, acquires, occupies, and exclusively controls territory within the State for the purpose of carrying on military operations. *Defect of title may become a new defense for murder.*

The decision of this question is of special importance in the particular case here involved because of the fact that the authorities of the State of Washington have consistently abstained from exercising jurisdiction to apprehend and punish anyone implicated in the alleged crime. The case of *Concessions Company v. Morris*, decided by the Supreme Court of Washington, 186 Pac. Rep. 655, shows that the county authorities of Pierce County, by demurring to the petition in that case, admitted as a fact that during the year 1918 the United States had exclusive jurisdiction over Camp Lewis.

Moreover, if proceedings should be instituted by State authorities to punish the parties implicated in this homicide, the courts of that State might not feel bound by the decision of the Circuit Court of Appeals but would follow any decision rendered by this court.

Without expressing an opinion on the question whether or not the crime of murder was actually committed, a question which of course can only be determined by a jury, it is of great importance to those charged with the administration of the criminal law and of great public importance that men indicted for murder should not escape trial altogether because neither the State court nor the Federal court will exercise jurisdiction. This is the only court which can decide finally the important question here involved, which from the nation-wide discussion and comment which the crime has excited must be regarded as one of great public interest.

JAMES M. BECK,

*Solicitor General.*

SEPTEMBER, 1923.

○